

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of EMMA O. PACHECO-CARDOZA and U.S. POSTAL SERVICE,  
PROCESSING & DISTRIBUTION CENTER, Fresno, CA

*Docket No. 03-2011; Submitted on the Record;  
Issued November 7, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether appellant established that she sustained an injury in the performance of duty on September 18, 2002.

On September 19, 2002 appellant, then a 43-year-old mail handler, filed a notice of traumatic injury alleging that, on September 18, 2002, at approximately 11:50 pm, she was injured when an over-the-road (OTR) pin fell hard on her right toe.<sup>1</sup> The record reflects that appellant received medical treatment on September 19, 2002 at the Fresno Community Medical Center, where she was treated for a contusion of the right toe. The patient history reported that appellant was injured when a pin from a cage fell on her great toe on the right side. She stopped work on September 19, 2002.

In a September 19, 2002 letter, appellant's supervisor, Ms. Gen, noted that appellant had an accident at work at 11:50 pm on Wednesday, September 18, 2002 and that she went to the Fresno Community Hospital. Appellant was noted as returning to work at 6:00 a.m. after her hospital visit. Ms. Gen stated that she interviewed appellant with regard to the injury at 6:30 a.m. on Thursday, September 19, 2002.

In a letter dated September 20, 2002, the employing establishment indicated that an investigation had been undertaken at appellant's duty station to ascertain how she was injured. The employing establishment stated that since "it was impossible for one's foot to slide under an OTR pin," serious doubt was cast as to whether the pin dropped on appellant's toe as alleged. It was also pointed out that appellant was required to wear heavy duty footwear to protect against injury, making it impossible for appellant's foot to have slid under the OTR pin.

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<sup>1</sup> Appellant's supervisor, Lena Gen, completed the reverse side of the traumatic injury claim form, indicating that appellant was regularly assigned to work from 11:00 p.m. until 7:30 a.m. and was at work on September 18, 2002. She check marked a box indicating that her knowledge of the facts of the injury was in agreement with appellant's statement.

In an October 22, 2002 letter, the Office advised appellant of the factual and medical evidence required to establish her claim for compensation, including the necessity that she submit a statement explaining exactly how her injury occurred and a reasoned medical opinion that discussed the causal relationship between the alleged work injury and her diagnosed condition. Appellant responded to the Office's request for evidence on September 18, 2002. Appellant explained that she worked as a safety captain for the employing establishment and that her job entailed writing up discrepancies from previous tours. She related that on the day of her injury she found a safety violation where an OTR mail container pin was blocking a fire extinguisher. Appellant alleged that she tried to move the OTR pin by pushing it from behind but it was loaded with mail. She then went to the front of the OTR pin and tried to pull it by using a bar that was attached to the front of the container. While she was pulling, she alleged that the pin fell on her right toe. Appellant challenged the employing establishment's contention that no one's foot would fit under an OTR pin, noting that "the bar that holds a cable that lifts the [OTR] lock pin in place, is sometimes to the left or right and not centered which is in a normal position, which can raise the pin up to four inches and ones boot or shoe can fit under that pin from the OTR and cause injury." Appellant provided pictures to clarify her point. She noted on one picture that the type of OTR pin used on the work floor did not have a cable guide to prevent the OTR from swaying back and forth.

In a decision dated December 10, 2002, the Office denied compensation on the grounds that appellant failed to establish fact of injury. The Office specifically held that the evidence was insufficient to support that appellant sustained an injury at the time, place and in the manner alleged on her claim form.<sup>2</sup> The Office also determined that since the medical evidence was based on a factually incorrect description of how appellant's injury occurred that evidence was not reliable to support causal relationship. In letters dated March 11 and 17, 2003, appellant requested an oral hearing. In a decision dated May 21, 2003, the Office denied appellant's oral hearing request on the grounds that it was untimely filed. The Office also noted that the issue of the case could be equally addressed through the reconsideration process.

The Board finds that appellant has established that she sustained an injury in the performance of duty on September 18, 2002.<sup>3</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.<sup>4</sup> Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to

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<sup>2</sup> The Office specifically noted that appellant's alleged injury occurred on a Wednesday, which was her regularly scheduled day off from work.

<sup>3</sup> Inasmuch as the Board finds that appellant sustained an injury on September 18, 2002 and the case will be remanded, the issue of whether her hearing request was timely filed is moot. The Board declines to address the propriety of the Office's May 21, 2003 decision.

<sup>4</sup> See Gary J. Watling, 52 ECAB 278 (2001); Michael E. Smith, 50 ECAB 313 (1999).

establish that the employment incident caused a personal injury.<sup>5</sup> The medical evidence required to establish causal relationship is usually rationalized medical evidence.<sup>6</sup>

The Board has held that an injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty as alleged, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on a claimant's statements in determining whether a *prima facie* case has been established. An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.<sup>7</sup> However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.<sup>8</sup>

The Board finds that the September 19, 2002 letter from Ms. Gen is sufficient to establish that appellant was at work in the performance of duty at 11:50 p.m. on September 18, 2002.<sup>9</sup> The Board is also persuaded by the evidence of record that an OTR pin fell on appellant's right foot on September 18, 2002 as alleged. Appellant has explained in great detail how she was injured and provided diagrams to demonstrate how an OTR pin can shift to allow at least a four inch clearance for her foot to be placed underneath it. The Board finds it reasonable to assume that the OTR pin fell on appellant's right foot during her attempt to pull the container in the front by a cable that did not secure the weight of the load. The Board also finds it reasonable to assume that a heavy pin could cause an injury to one's foot despite the use of safety foot wear.

Furthermore, the Board finds appellant's actions subsequent to the alleged incident to be consistent with her description of how the alleged injury happened. The record establishes that appellant immediately informed her supervisor that she hurt her foot on the OTR pin on September 18, 2002 and was sent to the hospital for medical attention. Appellant returned from the medical center and also immediately filed her claim for compensation. Ms. Gen signed the claim form stating her agreement with appellant's version of how the injury occurred on September 18, 2002.

Because the Board finds appellant's testimony to be credible as to how she was injured on September 18, 2002, and the record indicates that she received medical treatment consistent with her alleged injury, the Board concludes that appellant has established that she sustained a

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<sup>5</sup> *Id.*

<sup>6</sup> *Michael E. Smith, supra* note 4.

<sup>7</sup> *Irene St. John*, 50 ECAB 521 (1999); *Michael W. Hicks*, 50 ECAB 325 (1999).

<sup>8</sup> *Robert A. Gregory*, 40 ECAB 478 (1989).

<sup>9</sup> The Office questioned whether appellant was on duty on September 18, 2002 since she was not scheduled to work on Wednesdays. However the record establishes that appellant's regular work hours were from 11:00 p.m. until 7:30 a.m.. The record supports that appellant was at work on September 18, 2002 at 11:30 p.m. when the injury occurred.

contusion of the great toe of the right foot. The case is remanded for consideration of whether appellant has established employment-related disability for the time she was off work.

The decision of the Office of Workers' Compensation Programs dated December 10, 2002 is hereby reversed and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC  
November 7, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member